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8 **UNITED STATES DISTRICT COURT**  
9 **EASTERN DISTRICT OF CALIFORNIA**  
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11 LEVI SAELUA, JR., ) Case No.: 1:20-cv-01312-SKO (HC)  
12 )  
13 ) Petitioner, ) FINDINGS AND RECOMMENDATION TO  
14 ) DISMISS PETITION FOR WRIT OF HABEAS  
15 ) v. ) CORPUS  
16 )  
17 ) ORDER DIRECTING CLERK OF COURT TO  
18 ) ASSIGN DISTRICT JUDGE  
19 )  
20 ) CIOLLI, Warden, )  
21 ) Respondent. ) [21-DAY OBJECTION DEADLINE]  
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25 Petitioner is a federal prisoner proceeding *pro se* and *in forma pauperis* with a petition for writ  
26 of habeas corpus pursuant to 28 U.S.C. § 2241.

27 Petitioner is in the custody of the Bureau of Prisons at the United States Penitentiary in  
28 Atwater, California. He filed the instant federal petition on September 14, 2020. As discussed below,  
the Court will recommend that the petition be DISMISSED pursuant to the Court's authority under  
Rule 4 of the Rules Governing Section 2254 Cases.

**BACKGROUND**

On January 9, 2013, Petitioner was indicted in the United States District Court for the District  
of Hawaii for several drug trafficking offenses along with seven co-defendants. See United States v.  
Alisa, Case No. 1:13-cr-00021-SOM-3 (D. Hawaii). On July 26, 2013, Petitioner entered a plea  
bargain and pled guilty to one count of conspiracy to distribute, and possess with intent to distribute,

1 fifty grams or more of methamphetamine and a quantity of marijuana (21 U.S.C. §§ 841(a),  
2 841(b)(1)(A), 841(b)(1)(D), 846). Id. Pursuant to the plea agreement, Petitioner waived his right to  
3 appeal his conviction and sentence. Id. On November 14, 2013, Petitioner was sentenced to 300  
4 months imprisonment. Id.

5 On May 16, 2016, Petitioner filed a motion to vacate pursuant to 28 U.S.C. § 2255 in the  
6 sentencing court. Id. On April 6, 2017, the district court denied the motion. The court noted the  
7 recent decision in Beckles v. United States, 2017 WL 855781 (2017), in which the United States  
8 Supreme Court held that defendants sentenced after the sentencing guidelines became advisory in  
9 2005 could not challenge their sentences under § 2255 on the ground that, pursuant to Johnson v.  
10 United States, 135 S. Ct. 2552 (2015), guidelines affecting the career offender calculation were  
11 unconstitutionally vague. In light of Beckles, the court determined that Petitioner’s § 2255 motion  
12 was without merit.

13 On September 14, 2020, Petitioner filed the instant habeas petition. He claims he is actually  
14 innocent of the U.S.S.G. § 4B1.1 career offender enhancement because his prior offenses do not  
15 qualify as predicate offenses under Mathis v. United States, \_\_\_ U.S. \_\_\_, 136 S.Ct. 2243 (2016), and  
16 Descamps v. United States, 570 U.S. 254 (2013).

## 17 DISCUSSION

### 18 I. Screening of Petition

19 Rule 4 of the Rules Governing Section 2254 Cases<sup>1</sup> requires the Court to make a preliminary  
20 review of each petition for writ of habeas corpus. The Court must summarily dismiss a petition “[i]f it  
21 plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in  
22 the district court . . . .” Rule 4; O’Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990). The Court  
23 may dismiss a petition for writ of habeas corpus, either on its own motion under Rule 4, pursuant to  
24 the respondent’s motion to dismiss, or after an answer to the petition has been filed. Advisory  
25 Committee Notes to Habeas Rule 8. The Court will exercise its authority under Rule 4 in  
26 recommending dismissal of the petition.

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28 <sup>1</sup> The Rules Governing Section 2254 Cases in the United States Courts (Habeas Rules) are appropriately applied to  
proceedings undertaken pursuant to 28 U.S.C. § 2241. Habeas Rule 1(b).

## 1     II. Jurisdiction

2             A federal prisoner who wishes to challenge the validity or constitutionality of his federal  
3 conviction or sentence must do so by way of a motion to vacate, set aside, or correct the sentence  
4 under 28 U.S.C. § 2255. Tripati v. Henman, 843 F.2d 1160, 1162 (9th Cir. 1988); see also Stephens v.  
5 Herrera, 464 F.3d 895, 897 (9th Cir. 2006), *cert. denied*, 549 U.S. 1313 (2007). In such cases, only  
6 the sentencing court has jurisdiction. Tripati, 843 F.2d at 1163; Hernandez v. Campbell, 204 F.3d 861,  
7 865 (9th Cir. 2000). Generally, a prisoner may not collaterally attack a federal conviction or sentence  
8 by way of a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. Grady v. United States,  
9 929 F.2d 468, 470 (9th Cir. 1991); Tripati, 843 F.2d at 1162; see also United States v. Flores, 616 F.2d  
10 840, 842 (5th Cir. 1980).

11             In contrast, a prisoner challenging the manner, location, or conditions of that sentence’s  
12 execution must bring a petition for writ of habeas corpus under 28 U.S.C. § 2241 in the district where  
13 the petitioner is in custody. Stephens, 464 F.3d at 897; Hernandez, 204 F.3d at 865. “The general rule  
14 is that a motion under 28 U.S.C. § 2255 is the exclusive means by which a federal prisoner may test  
15 the legality of his detention, and that restrictions on the availability of a § 2255 motion cannot be  
16 avoided through a petition under 28 U.S.C. § 2241.” Stephens, 464 F.3d at 897 (citations omitted).

17             An exception exists by which a federal prisoner may seek relief under § 2241, referred to as the  
18 “savings clause” or “escape hatch” of § 2255. United States v. Pirro, 104 F.3d 297, 299 (9th Cir. 1997)  
19 (quoting 28 U.S.C. § 2255); see Harrison v. Ollison, 519 F.3d 952, 956 (9th Cir. 2008); Hernandez,  
20 204 F.3d at 864-65. “[I]f, and only if, the remedy under § 2255 is ‘inadequate or ineffective to test the  
21 legality of his detention’” may a prisoner proceed under § 2241. Marrero v. Ives, 682 F.3d 1190, 1192  
22 (9th Cir. 2012); see 28 U.S.C. § 2255(e). The Ninth Circuit has recognized that it is a very narrow  
23 exception. Ivy v. Pontesso, 328 F.3d 1057, 1059 (9th Cir. 2003). The exception will not apply  
24 “merely because section 2255’s gatekeeping provisions,” such as the statute of limitations or the  
25 limitation on successive petitions, now prevent the courts from considering a § 2255 motion. Id., 328  
26 F.3d at 1059 (ban on unauthorized or successive petitions does not *per se* make § 2255 inadequate or  
27 ineffective); Aronson v. May, 85 S.Ct. 3, 5 (1964) (a court’s denial of a prior § 2255 motion is  
28 insufficient to render § 2255 inadequate.); Moore v. Reno, 185 F.3d 1054, 1055 (9th Cir. 1999) (per

1 curiam) (§ 2255 not inadequate or ineffective simply because the district court dismissed the § 2255  
2 motion as successive and court of appeals did not authorize a successive motion).

3 The Ninth Circuit has held that Section 2255 provides an ‘inadequate and ineffective’ remedy  
4 (and thus that the petitioner may proceed under Section 2241) when the petitioner: (1) makes a claim  
5 of actual innocence; and, (2) has never had an ‘unobstructed procedural shot’ at presenting the claim.  
6 Harrison, 519 F.3d at 959; Stephens, 464 F.3d at 898; *accord* Marrero, 682 F.3d at 1192. The burden  
7 is on the petitioner to show that the remedy is inadequate or ineffective. Redfield v. United States, 315  
8 F.2d 76, 83 (9th Cir. 1963). If a petitioner fails to meet this burden, then his § 2241 petition must be  
9 dismissed for lack of jurisdiction. Ivy, 328 F.3d at 1060.

10 Here, Petitioner is challenging the validity and constitutionality of his sentence as imposed by  
11 the United States District Court for the District of Hawaii, rather than an error in the administration of  
12 his sentence. Therefore, the appropriate procedure would be to file a motion pursuant to § 2255 in the  
13 Hawaii District Court, not a habeas petition pursuant to § 2241 in this Court. Petitioner acknowledges  
14 this fact in his petition; however, he claims the Court has jurisdiction pursuant to the savings clause,  
15 because he is actually innocent of the sentencing enhancement, he has already sought relief by way of  
16 § 2255, and he has not had an unobstructed procedural opportunity to present his claim. Nevertheless,  
17 section 2241 is unavailable, because Petitioner does not present a claim of actual innocence.

18 A. Actual Innocence

19 In the Ninth Circuit, a claim of actual innocence for purposes of the Section 2255 savings  
20 clause is tested by the standard articulated by the United States Supreme Court in Bousley v. United  
21 States, 523 U.S. 614 (1998). Stephens, 464 U.S. at 898. In Bousley, the Supreme Court explained  
22 that, “[t]o establish actual innocence, petitioner must demonstrate that, in light of all the evidence, it is  
23 more likely than not that no reasonable juror would have convicted him.” Bousley, 523 U.S. at 623  
24 (internal quotation marks omitted). Actual innocence means factual innocence, not mere legal  
25 insufficiency. Id. In this case, Petitioner makes no claim of being factually innocent of drug  
26 trafficking. Rather, he complains he is actually innocent of the *sentence* he received. Under the  
27 savings clause, Petitioner must demonstrate that he is actually innocent of the crime for which he has  
28 been convicted, not the sentence imposed. See Ivy, 328 F.3d at 1060; Lorentsen, 223 F.3d at 954 (to

1 establish jurisdiction under Section 2241, petitioner must allege that he is “‘actually innocent’ of the  
2 crime of conviction”). Therefore, the instant § 2241 petition does not fit within the exception to the  
3 general bar against using Section 2241 to collaterally attack a conviction or sentence imposed by a  
4 federal court. See Stephens, 464 F.3d at 898-99 (concluding that, although petitioner satisfied the  
5 requirement of not having had an “unobstructed procedural shot” at presenting his instructional error  
6 claim under Richardson v. United States, 526 U.S. 813, 119 (1999), petitioner could not satisfy the  
7 actual innocence requirement as articulated in Bousley and, thus, failed to properly invoke the escape  
8 hatch exception of Section 2255).

9       Petitioner claims that pursuant to the Ninth Circuit’s decision in Allen v. Ives, 950 F.3d 1184,  
10 1189 (9th Cir. 2020), he may bring his challenges to his sentence via the savings clause. In Allen, the  
11 Ninth Circuit addressed an issue it had previously left open and concluded that if a federal prisoner  
12 shows that (under a retroactively applicable change in the law) a predicate conviction for career  
13 offender status under the mandatory sentencing guidelines no longer qualified as such, then the factual  
14 predicate for his mandatory sentencing enhancement did not exist, he is actually innocent of the  
15 enhancement, and may file qualify for escape hatch jurisdiction under 28 U.S.C. § 2255(e). Like the  
16 petitioner in Allen, Petitioner claims that Mathis v. United States, \_\_\_ U.S. \_\_\_, 136 S.Ct. 2243 (2016),  
17 and Descamps v. United States, 570 U.S. 254 (2013), retroactively establish his innocence as to his  
18 sentence.

19       In Allen, the Ninth Circuit noted that the petitioner in that case was sentenced under then-  
20 *mandatory* Sentencing Guidelines. In contrast, in this case the petitioner was sentenced under  
21 *advisory* Sentencing Guidelines. In Jaramillo v. United States, 2020 WL 3001783 (D.Az. 2020), the  
22 Arizona District Court noted this distinction and Allen’s limited application. The Arizona Court noted  
23 that both the Sixth Circuit and the Eleventh Circuit found that a petitioner could not satisfy the  
24 demanding actual innocence standard by challenging Guidelines which are advisory. Jaramillo, 2020  
25 WL 3001783, \*11-12. In Gibbs v. United States, 655 F.3d 473, 479 (6<sup>th</sup> Cir. 2011), the appellate court  
26 stated:

27       In federal sentencing cases, federal law authorizes an imprisonment range. While the  
28 sentencing guidelines are used as a starting point for determining where within the  
statutorily-set range a prisoner’s sentence should fall, the guidelines themselves are  
advisory. A challenge to the sentencing court’s guidelines calculation, therefore, only

1 challenges the legal process used to sentence a defendant and does not raise an  
2 argument that the defendant is ineligible for the sentence she received. The Supreme  
Court did not intend the “actual innocence” exception to save such procedural claims.

3 Similarly, in Spencer v. United States, 773 F.3d 1132, 1149 (11th Cir. 2014), the Eleventh  
4 Circuit found no basis for a finding of actual innocence of an advisory Guideline. The Eleventh  
5 Circuit noted:

6 Spencer does not allege that he is actually innocent of the crime for which he was  
7 indicted, nor that any of his prior convictions have been vacated. Instead, he contends  
8 only that the district court erroneously classified him as a career offender under the  
9 advisory guidelines. But any miscalculation of the guideline range cannot be a  
complete miscarriage of justice because the guidelines are advisory. If the district court  
were to resentence Spencer, the district court could impose the same sentence again.

10 The same holds true here. Petitioner was sentenced in 2013 well after the Supreme Court  
11 rendered the Sentencing Guidelines advisory in United States v. Booker, 543 US. 220, 245 (2005).  
12 Any error in calculating the advisory Guideline range could not alter the sentence for which he is  
13 statutorily eligible; therefore, Petitioner’s claims do not meet the demanding actual innocence  
14 exception. See Gibbs, 655 F.3d 478-79 (quoting Sawyer v. Whitley, 505 U.S. 333, 336 (1992) (“[T]o  
15 show ‘actual innocence’” in the sentencing context, the petitioner ‘must show by clear and convincing  
16 evidence that, but for a constitutional error, no reasonable juror would have found the petitioner  
17 eligible for the ... penalty under the applicable ... law.’”)) Therefore, the Court is without jurisdiction  
18 and the petition should be dismissed.

### 19 ORDER

20 The Clerk of Court is DIRECTED to assign a district judge to this case.

### 21 RECOMMENDATION

22 For the foregoing reasons, the Court RECOMMENDS that the Petition for Writ of Habeas  
23 Corpus be SUMMARILY DISMISSED for lack of jurisdiction.

24 This Findings and Recommendation is submitted to the United States District Court Judge  
25 assigned to the case pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 72-304 of the  
26 Local Rules of Practice for the United States District Court, Eastern District of California. Within  
27 twenty-one (21) days after being served with a copy of this Findings and Recommendation, any party  
28 may file written objections with the Court. Such a document should be captioned “Objections to

1 Magistrate Judge’s Findings and Recommendation.” Replies to the Objections shall be served and  
2 filed within ten (10) court days (plus three days if served by mail) after service of the Objections. The  
3 Court will then review the Magistrate Judge’s ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The  
4 parties are advised that failure to file objections within the specified time may waive the right to  
5 appeal the Order of the District Court. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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7 IT IS SO ORDERED.

8 Dated: September 16, 2020

/s/ Sheila K. Olerto  
9 UNITED STATES MAGISTRATE JUDGE  
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